IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-....73-1627

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

against

LEON NEWSOME,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. 73-.....

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

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against

LEON NEWSOME,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered herein on January 28, 1974.

Opinions Below

Both the opinion of the Court of Appeals and the memorandum and order of the District Court for the Eastern District of New York are not yet reported. They appear in the appendix beginning at pages 1a and 3a, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1974. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Does a state defendant's plea of guilty waive federal habeas corpus review of his conviction, even though under state law, he has been permitted review in the state appellate courts of the denial of his motion, on constitutional grounds, to suppress the evidence that would have been offered against him had there been a trial?

2. Assuming question "1" is answered in the affirmative is N.Y. Penal Law § 240.35(6) constitutional?

Statutory Provisions Involved

28 U.S.C. § 2241(c) provides in pertinent part:

> "The writ of habeas corpus shall not extend to a person unless—
>
> * * *
>
> (3) He is in custody in violation of the Constitution or law or treaties of the United States; * * *"

N.Y. Penal Law § 240.35 provides in pertinent part:

> "A person is guilty of loitering when he
>
> * * *
>
> (6) Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or

> fails to give a reasonable credible account of his conduct and purposes; * * *"

McKinney's Consolidated Laws of New York, Vol. 39, page 166.

Statement of the Case

Respondent was arrested for loitering, N.Y. Penal Law § 240.35(6), in the lobby of a New York City Housing Authority building at 10:20 p.m. on February 12, 1970 after Housing Authority police were informed by an anonymous tenant that there was a suspicious person in the hallway.

A search of respondent's person made at the time of the arrest revealed a set of "works", so that he was also charged in the Criminal Court of the City of New York, County of Queens with possession of a dangerous drug, fourth degree, *id.*, § 220.05, and criminally possessing a hypodermic instrument, *id.*, § 220.45, both Class A misdemeanors carrying a maximum of one year's imprisonment.

The arresting officer testified at a pre-trial hearing that he had briefly observed respondent in the lobby. When approached by the officer and asked what he was doing, respondent replied, "I am not doing anything", claiming to have just arrived. He was unable to produce any identification. His arrest and search followed.

Respondent was found guilty of loitering and the motion to suppress was denied. The Court rejected the claim that the arrest for loitering was made without probable cause and that the statute was unconstitutional.

On May 7, 1970, respondent pleaded guilty to attempted possession of drugs and hypodermic charges. He was sentenced to 90 days imprisonment. He received an unconditional discharge on the loitering conviction.

Respondent never served the jail sentence. A certificate of reasonable doubt was issued pursuant to former N.Y. Code of Crim. Pro. § 527 and petitioner was enlarged on $100 cash bail pending appeal. He has remained at large ever since.

An appeal was taken to the Appellate Term of the Supreme Court, Second and Eleventh Judicial Districts. On June 21, 1971 the judgment of the Criminal Court was modified by reversing the loitering conviction on the grounds of insufficient evidence and a defective information. However, the search incident to the loitering arrest which yielded the contraband was upheld on the basis that probable cause had existed to arrest respondent on that charge.

On July 14, 1971, leave to appeal to the New York Court of Appeals was denied by Hon. Charles D. Breitel, Associate Judge. Certiorari was denied sub nom. *Newsome* v. *New York*, 405 U.S. 908 (1972). The instant proceeding was then commenced in the District Court.

The named respondents never appeared. In view of his duty to defend the constitutionality of state statutes, N.Y. Executive Law § 71, the Attorney General of the State of New York requested and was granted leave to intervene as a respondent.*

On May 23, 1972, the District Court dismissed the petition for a writ of habeas corpus for lack of jurisdiction on the ground that petitioner was not in custody within the meaning of 28 U.S.C. § 2241. A certificate of probable cause, leave to proceed *in forma pauperis* and assigned counsel were granted by the Court of Appeals. The case was held pending the decision of this Court in *Hensly* v.

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* The opinion of the Court of Appeals erroneously states at page 7a that the petitioner appeared in this proceeding for the first time before that Court. In fact, he had intervened and appeared at all state appellate proceedings as well as in the District Court.

Municipal Court, 411 U.S. 345 (1973) and remanded in the light of that ruling.

On July 12, 1973, the District Court granted petitioner's application for a writ of habeas corpus. The decision was based upon the fact that the contraband was seized incidental to an arrest on a charge of loitering, N.Y. Penal Law § 240.35(6),* which was held unconstitutional in *People* v. *Berck,* 32 N Y 2d 567; *cert. den. sub nom.; New York* v. *Berck,* 414 U.S. ——, # 73-581, 42 U.S. Law Week 3352 (Dec. 10, 1973).

On appeal, the judgment of the District Court was affirmed. In its decision, the Court of Appeals adhered to its earlier rulings that federal habeas corpus was available to one in respondent's position whose conviction was based on a plea of guilty (7-11a). It also held N.Y. Penal Law § 240.35(6) unconstitutional, basing its decision largely upon that of the New York Court of Appeals in the *Berck* case (11-17a).

Reasons for Granting the Writ

I.

By permitting a state defendant convicted on a plea of guilty to maintain a proceeding for federal habeas corpus unrelated to the plea itself, merely on the strength of having been permitted a limited right of appeal in the state courts, the Court of Appeals has decided an important question of federal law either contrary to the applicable decisions of this Court or has decided a question which heretofore has not, but should be decided by this Court. The decision below also conflicts with that of *Mann* v. *Smith,* 488 F. 2d 245 (9th Cir. 1973), cert. den. —— U.S. ——, 42 U.S. Law Week 3469 (Feb. 19, 1974).

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* The decision (apparently through clerical oversight) erroneously states that petitioner was convicted of loitering.

This Court has consistently held that one who pleads guilty to a crime lacks standing to raise anything on post conviction review except the validity of the plea itself, *Tollett* v. *Henderson,* 411 U.S. 258 (1973); *Brady* v. *United States,* 397 U.S. 742 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970); *Parker* v. *North Carolina,* 397 U.S. 790 (1970); and *North Carolina* v. *Alford,* 400 U.S. 25 (1970). This Court has recognized that a plea of guilty is

> "more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a judge or jury."

Brady v. *United States, supra,* 397 U.S. at 748.

Most recently in *Tollett* v. *Henderson, supra,* this Court declared:

> "We thus reaffirm the principle recognized in the *Brady* trilogy; a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*" (411 U.S. at 26).

It is recognized that when the Second Circuit took a contrary position in such cases as *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209, 214-15 (2d Cir. 1967); *United States ex rel. Molloy* v. *Follette,* 391 F. 2d 231, 232 (2d Cir. 1968), this Court had not yet decided the

Henderson, Brady, Richardson, Parker and *Alford* cases, *supra.* However, its continued adherence to this doctrine as illustrated by its decisions in *United States ex rel. Stephen J. B.* v. *Shelley,* 430 F. 2d 215, 217 f.n. 3 (2d Cir. 1970) wherein it misconstrued this Court's opinion in *Richardson* at 397 US at 773, f.n. 13 and the instant case is, we submit, a serious deviation from the authoritative decisions of this Court.*

On the other hand, if the Court of Appeals was correct in distinguishing *Tollett* v. *Henderson, supra,* on the ground that Tennessee law made no provision for the preservation of constitutional claims after a defendant has p aded guilty (10a), then new ground has indeed been broken which merits full scrutiny by this Court.

Even if New York and California law does not reflect a future trend in the law throughout the United States the issue presented herein is sufficiently significant of itself to warrant review by this Court for the purpose of resolving the conflict between the Second and Ninth Circuit presented by the instant case and that of *Mann* v. *Smith, supra.*

In an attempt to distinguish the *Mann* case, the Second Circuit decision makes light of its differences with the Ninth Circuit, characterizing them as dictum, because of Mann's resort to extraordinary writ rather than appeal, p. 10a, f.n. 9. However, a close reading of *Mann* demonstrates, beyond doubt, that the majority considered the form of post-conviction review to be immaterial; it specifically rejected the decisions of the Second Circuit which were relied upon by the dissenting judge and held itself to be bound by *Tollett* v. *Henderson,* see 488 F. 2d at 247.

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* The Second Circuit also overlooked the fact that respondent is not even a proper party to raise the issue of the constitutionality of N.Y. Penal Law § 240.35(6), since the Appellate Term reversed that conviction holding in his favor on non-constitutional grounds. Thus there was not even a live controversy presented by this constitutional claim, *Golden* v. *Zwickler,* 394 U.S. 103 (1969).

One cannot conclude without pointing to the other ill effects of the decision below:

First, while it permits New York defendants such as respondent to maintain a habeas corpus proceeding, the Second Circuit has continued to strictly adhere to this Court's ruling with respect to both federal, *Santana* v. *United States,* 477 F. 2d 721, 722 (2d Cir. 1973) and other state, *Bergin* v. *MacDougall,* 432 F. 2d 935 (2d Cir. 1970) convictions. Therefore, it is anomalous, to say the least, that it should have carved out a special federal habeas corpus law exception for New York defendants based upon a procedural right which exists solely as a matter of state law. Cf. *McMann* v. *Richardson, supra,* 397 U.S. at 766.

Second, in enacting former N.Y. Code of Crim. Pro. § 813-c [now N.Y. Crim. Pro. Law § 710.70(2)] the New York Legislature never intended to, indeed, could not constitutionally affect a person's entitlement to federal habeas corpus. Such a result should not be achieved by judicial construction, *Rogers, supra,* 381 F. 2d at 214-15. Even if collateral relief is barred to a defendant, direct review in the Supreme Court of the state appellate court's rulings remains a possibility, 28 U.S.C. § 1257, and was sought in the instant case, *Newsome* v. *New York, supra.*

In its continued adherence to the policy expressed in the *Rogers, Molloy* and *Stephen J.B.* cases, the Second Circuit has done violence to "the beneficent and enlightened statute" [§ 813-c] and has sprung a "trap" on the State of New York, see *Stephen J.B., supra,* 430 F. 2d at 217-18, f.n. 3.

II.

The instant case also presents the issue, not heretofore decided by this Court, whether the State may constitutionally prevent "inchoate crime" by arresting and removing from the scene and, where necessary, searching persons who, the objective circumstances indicate, are loitering for

the purpose of committing illegal acts, but have not done anything rising to the level of an attempt to commit a crime.

This Court has held that a properly drawn loitering statute is constitutional. *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 91 (1965). However, in the last few years, it has struck down various State loitering laws for being unconstitutionally vague. *Palmer* v. *City of Euclid,* 402 U.S. 544 (1971). *Coates, et al.* v. *City of Cincinnati,* 402 U.S. 611 (1971), *Papachristou* v. *Jacksonville,* 405 U.S. 156, (1972), and *Smith* v. *Florida,* 405 U.S. (1972). Although the statutes involved in those cases differ significantly in scope and approach from the New York loitering statute, the effect of these decisions is to render uncertain the state of the law in an area which is vital to modern police work.

To date, this Court has only dealt either with statutes which punished mere "hanging around", *Palmer* v. *City of Euclid, supra,* 402 U.S. at 544, as have other lower federal and state courts.*

With all respect to the learned opinions of the Court below and the majority in *People* v. *Berck, supra,* we would submit that the statute can be construed so as to conform to this Court's probable cause test set down in *Sibron* v. *New York,* 392 U.S. 42, 61-62 (1968); and this Court's rul-

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* See *Anderson* v. *Nemetz,* 474 F. 2d 814 (9th Cir. 1973); *United States* v. *Hall,* 459 F. 2d 831 (D.C. Cir. 1972); *Ricks* v. *District of Columbia,* 414 F. 2d 1097 (D.C. Cir. 1968); *Kirkwood* v. *Loeb,* 323 F. Supp. 611, 616 (W.D. Tenn. 1971); *Scott* v. *District Attorney, Jefferson Parish,* 309 F. Supp. 833 (E.D. La. 1970); *State* v. *Starks,* 186 N.W. 2d 245 (Wisc. 1971); *Baker* v. *Binder,* 274 F. Supp. 658 (W.D. Ky. 1967); other cases have dealt with laws similar to the vagrancy statute voided in *Fenster* v. *Leary,* 20 N Y 2d 309, 229 N.E. 2d 426; 282 N.Y.S. 2d 739 (1967). *United States* v. *Kilgen,* 431 F. 2d 627 (5th Cir. 1970); or a combination of two, *State* v. *Grahovac,* 480 P. 2d 148 (Hawaii, 1970); *Arnold* v. *City and County of Denver,* 464 P. 2d 515 (Colo. 1970).

ing that a trained police officer is permitted to draw reasonable inferences from a person's conduct, as in this case, where it is clear to any reasonable person that petitioner was up to no good, *Terry* v. *Ohio,* 392 U.S. 1, 23 (1968). This is underscored by this Court's recent decision in *Lewis* v. *City of New Orleans,* —— U.S. ——, 42 U.S. Law Week 4241, 4242 (Feb. 19, 1974) in which it recognized that an otherwise unconstitutional statute might be saved by a limiting construction.

CONCLUSION

For the above reasons certiorari should be granted.

Dated: New York, New York, April 23, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
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SAMUEL A. HIRSHOWITZ
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APPENDIX A

Memorandum and Order of the District Court.

72 C 453

July 12, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel. LEON NEWSOME,
Petitioner,

against

BERNARD J. MALCOM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,
Respondents,

LOUIS J. LEFKOWITZ Attorney General of the State of New York,
Intervenor-Respondent.

MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

The petitioner applies for a writ of habeas corpus. He challenges the constitutionality of the State statute, which he was convicted of violating.

This Court by its memorandum and order dated May 23, 1972 dismissed the petition on the ground that the peti-

tioner was not in custody within the meaning of the Habeas Corpus Statute, 28 U. S. C. 2241.

The Circuit Court of Appeals for the Second Circuit, by order dated April 26, 1973 remanded the action for a decision on the merits.

Thereafter, the Court of Appeals of the State of New York handed down its opinion in the case of The People & C., respondent v. Alan Berck, decided July 2, 1973 held that Section 240.35 (6)—Loitering is unconstitutional, that the conviction should be reversed and the complaint dismissed.

It follows, therefore, that the writ should issue.

It is so ordered.

Copies hereof have been forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

APPENDIX B

Decision of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 693—September Term, 1973.

(Argued January 11, 1974 Decided January 28, 1974.)

Docket No. 73-2413

UNITED STATES OF AMERICA ex rel.
LEON NEWSOME,

Petitioner-Appellee,

v.

BENJAMIN J. MALCOLM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Intervenor-Respondent-Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order granting a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2254, entered in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

Affirmed.

Decision of the Court of Appeals.

ROBERT S. HAMMER, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Intervenor-Respondent-Appellant.*

STANLEY NEUSTADTER, New York, New York (William J. Gallagher, The Legal Aid Society, on the brief), *for Petitioner-Appellee.*

KAUFMAN, *Chief Judge:*

This appeal presents the rare instance where by granting a writ of habeas corpus to a state prisoner we intrude less into local administration of criminal justice than if we were to follow the contrary course suggested by the state Attorney General. Judge Bruchhausen granted Leon Newsome's petition pursuant to 28 U.S.C. 2254 because the loitering statute under which Newsome was arrested has been declared unconstitutional by the New York Court of Appeals. Since Newsome is collaterally attacking a conviction not for loitering, but for a narcotics violation arising from evidence seized at the time of his arrest for loitering, his petition raises an interesting question of Fourth Amendment law. We agree with the New York Court of Appeals in its evaluation of the loitering statute and, because of the particular constitutional infirmities involved, are compelled to conclude that the writ should issue. We affirm.

I. FACTUAL BACKGROUND

The essential facts are not in dispute and can be related briefly. On February 12, 1970, New York City Housing Authority Policeman Warren J. Ungar and a fellow officer

responded to an anonymous telephone call "to the effect that someone was in the hallway" of a City Housing Authority dwelling at 81-03 Hammel Boulevard, Queens, New York. The patrolmen entered the building at approximately 10:20 p.m. and immediately approached two men—Leon Newsome and an unidentified companion—who were standing in the lobby near the main doorway. In response to Ungar's questions, Newsome said he had just entered the building. When Newsome was unable to produce identification, he was arrested for loitering (N.Y. Pen. L. 240.35(6)) and searched incident to that arrest. Patrolman Ungar placed Newsome against the wall and "went through the pockets." This search produced a closed black leather pouch in which Ungar found a functional hypodermic instrument and a glassine envelope later determined to contain 2 grains of heroin. Accordingly, Newsome was also charged with possession of dangerous drugs (N.Y. Pen. L. 220.05) and criminal possession of a hypodermic instrument (N.Y. Pen. L. 220.45).

After a brief nonjury trial before Criminal Court Judge Nicholas Tsoucalas on April 7, 1970, Newsome was convicted for loitering. Judge Tsoucalas immediately proceeded to conduct a hearing on Newsome's motion to suppress the evidence seized at the time of his arrest.[1] Newsome raised and Judge Tsoucalas rejected the same claims at trial and on the motion to suppress: that the patrolmen did not have probable cause to arrest Newsome for loitering and that the loitering statute was unconstitutional and could not therefore serve as the basis for searches incident to arrests.

On May 7, 1970, the date scheduled for a trial on the drug charges, Newsome appeared before Judge Abraham Roth and withdrew his prior pleas of not guilty and pleaded guilty to the lesser charge of "attempted possession

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[1] Patrolman Ungar was the only witness at the loitering trial and the suppression hearing.

of dangerous drugs" (N.Y. Pen. L. 110(6)). He was sentenced immediately to 90 days in the City Reception Center, and received an unconditional release for the loitering conviction. The minutes of the May 7 proceedings clearly disclose Newsome's intention to appeal both the loitering conviction and, pursuant to N.Y. Code. Crim. P. 813-c,[2] the denial of his motion to suppress. Indeed, at the close of proceedings on May 7, Judge Roth granted a certificate of reasonable doubt (N.Y. Code. Crim. P. 527) because "there is a question of law involved here, very serious question of law, with regard to the loitering charge." On direct appeal to the Appellate Term, the loitering conviction was reversed for insufficient evidence; but, because the court found that probable cause existed to arrest Newsome for loitering, the search incident to that arrest was held valid and the drug convitcion affirmed.[3] Leave to appeal to the New York Court of Appeals was denied and a petition for a writ of certiorari was denied *sub nom. Newsome* v. *New York*, 405 U.S. 908 (1972). The instant petition for a writ of habeas corpus was filed on April 6, 1972,[4] just five days before Newsome was to begin serving his 90 day sentence (imposition of which had been stayed pending appeal).[5]

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[2] Presently codified as N.Y. Crim. Proc. L. 710.70(2).

[3] The Appellate Term disposed of Newsome's appeal by issuing a summary order which is silent on the constitutional claims.

[4] Although Newsome has not pursued state avenues of collateral attack, his federal claims were presented to the state courts on direct appeal. He has, therefore, satisfied the exhaustion requirement, *Picard* v. *Connor*, 404 U.S. 270, 275 (1971), and the state makes no claim to the contrary.

[5] On May 23, 1972, Judge Bruchhausen dismissed the petition because Newsome was not "in custody" as required by 28 U.S.C. 2241. On appeal, we remanded by summary order (April 26, 1973) (72-1875) for a disposition on the merits, in light of the Supreme Court's holding on the custody question in *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973).

On July 2, 1973, prior to Judge Bruchhausen's final disposition on the merits, the New York Court of Appeals in a well-reasoned opinion declared § 240.35(6) unconstitutional on its face because, among other infirmities, it was overly vague. *People* v. *Berck*, 32 N.Y.2d 567, 347 NYS2d 33 (1973), *cert. denied sub nom. New York* v. *Berck*, 42 U.S.L.W. 3352 (Dec. 11, 1973). On July 12, 1973, Judge Bruchhausen granted the writ.[6] The New York State Attorney General, who had not appeared in prior proceedings in this case, requested and was granted leave to intervene as a respondent on the present appeal.

II. Standing

As a threshold issue, the Attorney General raises the not unfamiliar claim that Newsome is without standing to pursue his underlying constitutional attacks on the drug conviction because those claims were waived when Newsome pleaded guilty. Ordinarily, it is true that an intelligent and voluntary guilty plea waives a defendant's right to trial and all claims of constitutional infirmities in the prosecution, which could have been raised at trial. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970).[7] But in *McMann* v. *Richardson*, the Supreme Court noted that an exception to the general waiver rule exists

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[6] Apparently because of a clerical error, Judge Bruchhausen's memorandum and order incorrectly indicate that Newsome is attacking a conviction for loitering. As noted above, the loitering conviction was vacated by the Appellate Term and the instant petition attacks the drug conviction.

[7] After a defendant pleads guilty on advice of counsel, "[t]he focus of federal habeas inquiry is the nature of the advice, and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." *Tollett* v. *Henderson*, *supra*, 411 U.S. at 266.

where state law permits a defendant to retain his collateral claims after pleading guilty. 397 U.S. at 766. New York is one of those states which permit a defendant to appeal specified adverse pretrial rulings even though he subsequently pleads guilty. The operative statutory provision at the time Newsome pleaded guilty was N.Y. Code Crim. P. 813-c, which stated: "the order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

We have characterized the New York procedure as "enlightened" for it permits a defendant whose sole defense is one of the specified constitutional claims, neither to suffer nor impose on the state the burden of going to trial simply to preserve his claim—a procedure which precipitated the enactment of § 813-c.[8] *See United States ex rel. Rogers* v. *Warden,* 381 F.2d 209, 214 (2d Cir. 1967). This new procedural device manifested obvious legislative determinations that trials are not to be encouraged in order to preserve a ground for appeal and that guilty pleas in such cases would aid in avoiding additions to beleaguered trial calendars. Accordingly, the rule in this circuit is well established that a New York defendant who has utilized § 813-c in the state courts may pursue his constitutional claim on a federal habeas corpus petition, for "it would be anomalous if a defendant by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal in state courts, simultaneously waived his right to present these same claims to a federal court . . . because he was lulled into following state procedures." *Id.* at 214-15. *See United States ex rel. Stephen J.B.* v. *Shelly,* 430 F.2d 215, 217

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[8] A companion section, 813-g, (presently codified as N.Y. Crim. Proc. L. 710.20(3), 710.70(2)) permitted similar appeal from the denial of a motion to suppress an allegedly coerced confession.

& n. 3 (2d Cir. 1970); *United States ex rel. Molloy* v. *Follette*, 391 F.2d 231 (2d Cir. 1968).

The Attorney General, despite our clear pronouncements on the issue, contends again, as he did in *Molloy* and *Stephen J.B.*, that we should abandon the rule first announced in *Rogers* and close the avenue of federal habeas to state petitioners who have entered pleas of guilty under the circumstances we have recounted. Again, we reject this argument and reaffirm our view that where state law permits a defendant to plead guilty without forfeiting his appeals on collateral constitutional claims, it would be a trap to the unwary if a defendant who waived his right to trial in reliance on the state appeal procedures was thereafter precluded from pressing his federal constitutional claims in the district court. We believe, moreover, that were we to nullify the vitality of § 813-c and similar statutes for federal habeas purposes, most defendants with competent counsel would be dissuaded from pleading guilty and instead would proceed to trial for the sole purpose of preserving claims for potential vindication on state review or federal habeas. The New York legislature passed § 813-c to prevent precisely this eventuality and federal courts should be reluctant to interefere with a state's administration of criminal justice, particularly when the result would be to add to its already congested criminal trial calendars. Accordingly, we refrain from confronting the state courts with a problem the legislature has attempted to ameliorate. We are of the view that the more appropriate forum for the Attorney General to express his dissatisfaction with § 813-c is the state legislature, not the federal courts.

As a final attack on our *Rogers-Molloy-Stephen J.B.* line of cases, the Attorney General contends that *Tollett* v. *Henderson, supra,* precludes all state prisoners who pleaded guilty from asserting collateral constitutional claims in federal habeas petitions—notwithstanding state

procedures which allow the defendant to retain those claims for purposes of *state* post-conviction remedies. In our view, *Tollett* does not stand for this proposition. In *Tollett* a Tennessee prisoner attacked his 25 year old conviction (entered after a guilty plea) for first degree murder on the ground that blacks were systematically excluded from the grand jury that indicted him. Tennessee had no procedure analogous to § 813-c for preserving constitutional claims after pleading guilty. The Supreme Court held that:

> after a criminal defendant pleads guilty on the advice of counsel he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity.

411 U.S. at 266. To be sure, *Tollett* did not mention the exception cut out in *McMann*, and to which we have referred, for states which provide for the preservation of constitutional claims, but given the absence of this type of provision in Tennessee law, that question was not before the court in *Tollett* and repetition of the principle would have been superfluous. Accordingly, we refuse to undertake the hazardous task of elevating silence to the level of *stare decisis*.[9] When, as here, a defendant enters

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[9] A split panel of the Ninth Circuit has apparently concluded that the exception noted in *McMann* has not survived *Tollett*. *Mann v. Smith* (9th Cir. July 9, 1973) (71-1932) slip op. *petition for cert. pending* 42 U.S.L.W. 3363 (Dec. 18, 1973). The language to this effect in the *Mann* majority opinion must be considered dicta, however, since the petitioner had not in fact availed himself of state post-plea appellate procedures. *Mann, supra*, at 2 n. 1. The court commented that the failure to appeal in state court cou-

(footnote continued on following page)

a plea of guilty and then follows acknowledged state procedures for preserving his claims, the guilty plea does not act as an automatic waiver.

III. Constitutionality of New York's Loitering Statute

Section 240.35(6) provides:

> A person is guilty of loitering when he: . . . Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes. . . .

We have noted that the New York Court of Appeals has already declared this provision unconstitutional on its face. *People* v. *Berck, supra.* In the instant proceeding, the Attorney General urges us, in effect, to instruct the state's highest court that its evaluation of a state statute was erroneous. Since the state court grounded its decision on the federal rather than the state Constitution, we must make an independent determination of the applicable federal standards. *See Townsend* v. *Sain,* 372 U.S. 293, 318 (1963). Accordingly, the question before us on this application for federal habeas corpus relief is whether the section violates due process. We conclude that it does.

(footnote continued from preceding page)

pled with an apparent plea bargain was "more consistent with a relinquishment of his Fourth Amendment claims than an attempt to preserve them." *Id.* Although we do not agree with the Ninth Circuit's reading of *Tollet's* impact on *McMann,* our holding is not inconsistent with the determination that a defendant who fails to invoke available state procedures will not automatically benefit on federal habeas from the mere existence of those procedures.

When § 240.35(6) became effective on September 1, 1967, it represented New York's formulation of a dragnet approach to the maintenance of public order that had its roots in feudal England and which has survived, despite considerable disapproval, in urban America. Originally conceived as a method to keep unemployed laborers from wandering between towns and terrorizing travelers, laws against vagrancy and loitering have been transformed into devices for preventing crime and for removing so-called nuisances—mobs and individual "undesirables"—from public places.[10] Despite the obvious governmental interest in preserving public order, a vagrancy-loitering statute will run afoul of the Constitution when its necessarily broad scope is stated in language so indefinite that it fails to:

> "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U.S. 88; *Herndon* v. *Lowry*, 301 U.S. 242.

Papachriston v. *Jacksonville*, 405 U.S. 156, 162 (1972). Moreover, because the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause, *Beck* v. *Ohio*, 379 U.S. 89 (1964); *Henry* v. *United States*, 361 U.S. 98 (1959). *See Papachristou* v. *Jacksonville*, *su-*

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[10] *See generally* Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960); Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956); Lacey, Vagrancy and Other Crimes of Personal Conditions, 66 Harv. L. Rev. 1203 (1953).

pra; Palmer v. *Euclid,* 402 U.S. 544 (1971). Indeed, it has been suggested that:

> because the elements of the . . . offense are obscure, even officers engaged in its good faith enforcement cannot gauge justification for . . . arrests consistently with Fourth Amendment principles.

Hall v. *United States,* 459 F.2d 831, 837 (D.C. Cir. 1972) (en banc).

Turning from our brief discussion of the history and purposes of vagrancy legislation to the specific statute in issue, we must scrutinize the New York statute in accordance with the standard enunciated in *Papachristou, Palmer,* and *Smith* v. *Florida,* 405 U.S. 172 (1972). Under the first prong of the vagueness test (*Papachristou* v. *Jacksonville, supra,* 405 U.S. at 162, *quoting, United States* v. *Harriss, supra,* 347 U.S. at 617) we must determine whether the statute's prohibitions are cast in terms sufficiently precise to give a reasonably intelligent person notice of the conduct that is proscribed. *See Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939). Newsome contends that the operative language is so indefinite that even a citizen who had "read and studied" the statute in an effort to regulate his behavior would be in a quandary. He suggests, moreover, that the linguistic imprecision is exacerbated because § 240.35(6) imposes criminal liability in the absence of criminal intent, a factor noted by the Supreme Court in *Papachristou,* 405 U.S. at 162. It is urged, therefore, that the elements of loitering may be established by suspicious circumstances of which a citizen may not be cognizant and for which he may bear no responsibility. The Attorney General asserts, on the other hand, that § 240.35(6) can be distinguished from the sttatutes disapproved in *Papachristou, Palmer,* and *Smith,* because it "focuses upon specifically criminal conduct."

On its face, the statute discloses that "loiter[ing]" "remain[ing]" or "wander[ing]" in an unspecified place for an unspecified period of time without apparent reason can establish the first element of the offense. Surely a citizen who sought to conform his conduct to this provision would be unable to discern whether he risked criminal responsibility by taking a leisurely stroll, by sitting briefly on a park bench, or by seeking shelter from the elements in the doorway of a building.

The second substantive component of the statute is established by "circumstances which justify suspicion that [a person] may be engaged or about to engage in crime."[11] Yet, such "circumstances" may reflect the "whim of the policeman," *People* v. *Berck, supra,* 347 N.Y.S.2d at 38, rather than the conduct of an individual who happened to "wander" into the midst of the police, thereby creating the "hazard of being prosecuted for knowing but guiltless behavior." *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964). With nothing more, the "suspect" is hardly offered a bright line test for distinguishing the licit from the illicit.

Moreover, there are insufficient guidelines for enforcement and thus § 240.35(6) does not pass constitutional muster on this ground as well. The section permits arrests and convictions for suspicion or for possible crime based on circumstances less compelling than the reasonable and articulable factors which are required to sustain a mere on-the-scene frisk. *Terry* v. *Ohio,* 392 U.S. 1 (1968); *Sibron* v. *New York,* 392 U.S. 40 (1968). It has been noted, and we agree, that the section could lend itself to the abuse

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[11] As construed by the New York courts, the third condition of § 240.35(6) ("upon inquiry . . . defendant refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes") is not in fact a substantive element of the crime of loitering. Rather, the police inquiry is a "procedural condition" to arrest under the statute. *People* v. *Schanbarger,* 24 N.Y.2d 288, 291-92, 300 N.Y.S.2d 100, 101-02 (1969). *See People* v. *Berck, supra,* 347 N.Y.S.2d at 36 n. 2.

of pretextual arrests of people who are members of unpopular groups or who are merely suspected of engaging in other crimes, without sufficient probable cause to arrest for the underlying crime.[12] For example, in *People* v. *Williams,* 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967), the court commented that:

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th . . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, night court had been adjourned, then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them.

286 N.Y.S.2d at 577. *See* Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 220-28 (1967); Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1, 8 (1960); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203, 1219-24 (1953). *See also Winters* v. *New York,* 333 U.S. 507, 540 (1948) (Frankfurter, *J.*, dissenting).

To the extent the statute can be interpreted to support dragnet, street-sweeping operations absent probable cause of actual criminality, it conflicts with established notions

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[12] We note, however, that there is no suggestion that Newsome was the target of a pretextual arrest and search, or that the officers failed to act in good faith.

of due process. *Beck* v. *Ohio, supra; Henry* v. *United States, supra; Wong Sun* v. *United States,* 371 U.S. 471, 479-82 (1963). Even in the absence of purposeful circumvention of traditional standards for lawful arrests, § 240.35(6) confers discretion that is simply too unbridled to satisfy due process standards. The "infirmity" lies in the imprecision of the statute, not the subjective intent of enforcement officials. The Supreme Court has noted, "[w]ell-intentioned prosecutors and judicial safeguards do not nuetralize the vice of a vague law." *Baggett* v. *Bullitt, supra,* 377 U.S. at 373.[13]

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[13]The defects which we find in § 240.35(6), and which were discussed by the New York Court of Appeals in *Berck,* are neither obscure nor manifestations of recent shifts in the law. The commentary accompanying § 240.35(6) in the New York Penal Law indicates that the subdivision was a new and "controversial" amendment. Subdivision 6 created a catch-all category to supplement other loitering provisions which specify with greater precision the conduct they proscribe. *See* N.Y. Pen. L. § 240.35. The court in *Berck* commented that subdivision 6 was patterned after § 250.12 of Tentative Draft 13 of the Model Penal Code. The American Law Institute abandoned that formulation, however, in its Proposed Official Draft precisely because the vagueness of the tentative draft was subject to the abuse of arrest and searches without probable cause. ALI, Model Penal Code, § 250.6, Proposed Official Draft at 227 (1962).

Even before the New York Court of Appeals struck down § 240.35(6), the lower state courts had experienced difficulty in interpreting the statute in a consistent manner to ensure even-handed enforcement. Three lower courts had declared § 240.35(6) unconstitutional (*People* v. *Bambino,* 69 Misc. 2d 387, 329 N.Y.S. 2d 922 (Nassau County Ct. 1972); *People* v. *Villanueva,* 65 Misc. 2d 484, 318 N.Y.S.2d 167 (Long Beach City Ct. 1971); *People* v. *Beltrand,* 63 Misc. 2d 1041 (New York City Crim. Ct.) *aff'd on other grounds,* 67 Misc. 2d 324, 324 N.Y.S.2d 477 (App. Term 1971)); two had upheld the statute in the face of constitutional challenges (*People* v. *Taggart,* 320 N.Y.S.2d 671 (Suffolk Dist. Ct. 1971); *People* v. *Strauss,* 320 N.Y.S.2d 628 (Nassau Dist. Ct. 1971)); and one court has expressed doubts over its constitutionality although it did not reach the ultimate question (*People* v. *Williams,* 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967)).

Applying the standards enunciated in *Papachristou*, *Palmer*, and *Smith*, we conclude, as did the New York Court of Appeals in *Berck*, that § 240.35(6) contravenes the Due Process Clause of the Fourteenth Amendment not only because it fails to specify adequately the conduct it proscribes, but also because it fails to provide sufficiently clear guidance for police, prosecutors, and the courts so that they can enforce the statute in a manner that is consistent with the Fourth Amendment. Accordingly, Newsome's arrest pursuant to that section was unlawful.

IV. Search Incident to Arrest

Having concluded that Newsome's arrest pursuant to an unconstitutional statute was unlawful, we turn our attention to whether the search conducted incident to that arrest was also unlawful. For the reasons set forth, we conclude that the search in this case was constitutionally invalid, that the evidence thus seized must be suppressed and that, accordingly, the writ should issue.

Searches incident to arrest comprise a well-recognized exception to the warrant requirement of the Fourth Amendment. This exception, of course, does not reduce the level of constitutional protection because it retains the safeguard that probable cause must exist to justify the intrusiveness of the underlying arrest. *United States* v. *Robinson*, 42 U.S.L.W. 4055 (Dec. 11, 1973); *Gustafson* v. *Florida*, 42 U.S.L.W. 4068 (Dec. 11, 1973). Indeed, in recently expanding the permissible scope of searches incident to lawful arrests, the Supreme Court placed great reliance on the existence of probable cause to arrest as a justification for its holding. *United States* v. *Robinson*, *supra*, 42 U.S.L.W. at 4060; *Gustafson* v. *Florida*, *supra*, 42 U.S.L.W. at 4069-70.

Newsome, however, was searched incident to arrest for the violation of a statute which we have found unconstitutional in the main because it substituted mere suspicion for probable cause as the basis for arrest. Thus, we consider his warrantless search constitutionally defective because to sustain its validity would emasculate the essential Fourth Amendment protection which only probable cause provides.[14] Accordingly, we affirm.

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[14] We disclaim any intention to fashion a per se principle that all searches incident to arrests under statutes later declared unconstitutional are invalid.